No. 87-399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA,
and its Clerk, DAVID B. BEACH,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE NEW YORK STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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Amicus Curiae, New York State Bar Association, respectfully requests this Court to affirm the decision of the Fourth Circuit Court of Appeals.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the New York State Bar Association ("NYSBA"), is a voluntary bar association primarily composed of

members of the bar of the State of New York. The NYSBA has approximately 47,000 members, including lawyers who are engaged in the practice of law in the private and public sectors, as well as judges, professors and law students.

The NYSBA seeks to promote rules and procedures concerning admission to the bar which are fair and equitable, while maintaining a high standard of competence. The rules of admission in New York State permit attorneys who have practiced for a fixed number of years in another state to join the bar of the State of New York by motion and without having to take a bar examination. New York State Court of Appeals Rule § 520.9. The NYSBA believes that the bar of the State of New York has flourished under its open admission rules, and the NYSBA is opposed to barriers to admission not only in New York, but in other states as well in which New York attorneys may wish to practice.

The challenged requirements are another example of artificial barriers to bar admission which promote the economic interests of local lawyers at the expense of rational and just bar admission. This case is therefore of great interest to the members of the NYSBA.

JURISDICTION

The jurisdictional grounds are fully set forth in the Brief of the Appellee and need not be set forth here again in accordance with Rule 36.5 of this Court.

SUMMARY OF ARGUMENT

The nature and reality of the practice of law in the United States is that an attorney often needs to represent clients in a number of states, and may wish to establish offices in two or more states. The courts below correctly set aside Rule 1A:1(c) as unconstitutional discrimination. Virginia's Rule employs the bar examination requirement as an artificial and unnecessary barrier to the admission of nonresident attorneys. Virginia discourages experienced out-of-state attorneys from joining its bar by requiring that the experienced attorneys take another

bar examination, or move into the state and practice there on a full-time basis.

The Appellee has fully briefed the issues surrounding the violation of the Privileges and Immunities Clause. The NYSBA wishes to emphasize to the Court that the bar examination requirement has been used by some states as an improper mechanism to limit competition by experienced attorneys from other states.

ARGUMENT

THE PRIVILEGES AND IMMUNITIES CLAUSE PREVENTS A STATE FROM USING A BAR EXAMINATION TO PUT AN UNREASONABLE BURDEN ON PRACTICE BY OUT-OF-STATE ATTORNEYS

According to the Appellants, twenty-three jurisdictions recognize that it is not necessary to re-examine lawyers qualified in other states in order to admit them to the bar. Appellants' Brief, at page 9. These jurisdictions, which include New York, have found that attorneys who have demonstrated their professional abilities in practice in other jurisdictions are fully competent to practice law without being subjected to the needless burden of a bar examination.

Experienced attorneys should be admitted by motion no matter where they reside or where they have practiced. There has been a marked trend toward uniformity of both substantive and procedural laws throughout the United States. All states, except one, have adopted the Uniform Commercial Code. Model codes, model rules and the Restatements have become a common language for all lawyers. Federal law, whether it be tax, criminal, labor or environmental, is a significant part of the common practice of all lawyers.

Whether it is due to a lawyer's decision to move to another state, or an out-of-state client or matter, today's lawyer may well represent clients in states other than those in which he or she

began practice. Indeed, the Court has recognized the value of a nonlocal lawyer to a client:

> A client may have a number of excellent reasons to select a nonlocal lawyer: his or her regular lawyers most familiar with the legal issues may be nonlocal; a nonresident lawyer may practice a specialty not available locally; or a client may be involved in an unpopular cause with which local lawyers are reluctant to be associated. See Piper, 470 U.S., at 281, 84 L.Ed. 2d 205, 105 S.Ct. 1272.

Frazier v. Heebe, 107 S.Ct. 2607, 2614 n. 12 (1987).

Pro hac vice admission is often not a satisfactory alternative to plenary admission. Such admission applies only to court appearances, not to counseling. Further, states have made *pro hac vice* admission a difficult, if not impossible, undertaking. The Court has observed that *pro hac vice* admission is purely discretionary and not a freely available alternative. *Frazier v. Heebe*, 107 S.Ct. 2607, 2614 n. 13 (1987); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 277 n. 2 (1985).

As the Fourth Circuit held, the costs, time and delay involved in taking a bar examination impose a heavy burden on the out-of-state practitioner. *Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 427 (4th Cir.), *prob. juris. noted*, *Supreme Court of Virginia v. Friedman*, 108 S.Ct. 283 (1987). The bar examination has been employed as a form of economic protectionism to deter out-of-state attorneys from entering the local legal markets. *Id. See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n. 18 (1985) (" 'Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition' "). Indeed, the Appellants themselves have expressed their concern that if Virginia's restrictive rule is lifted: "the number of reciprocity admissions in Virginia would skyrocket...". Brief of Appellants, filed with Fourth Circuit, at p. 22.

While the NYSBA does not quarrel with each state's right to impose its own standards for bar admission, the NYSBA opposes the use of bar examinations as a mechanism to restrict the delivery of legal services. One legal commentator has observed that:

> States recognizing no reciprocity and states requiring special attorneys' bar examinations fall almost entirely into two categories: (1) states in the Southeast or the Far West and (2) states in the Northeast, which serve as "bedroom" or "second home" areas for attorneys from nearby major legal centers. It is apparent that the states restricting admission by reciprocity are jurisdictions in which the local bar is subject to the potential influx of attorneys admitted in other jurisdictions because of expanding population, economic growth, or the movement of attorneys into suburban areas, second home, or retirement communities. *It has been asserted, with justification, that those states that have made the admission of attorneys most difficult have done so primarily to protect the economic interests of the local bar.*

Hafter, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 Miss. L.J. 1, 5-6 (1983) (footnotes omitted; emphasis added).

Members of the New York State bar have complained to the NYSBA about our neighboring state of New Jersey which requires that experienced attorneys pass the New Jersey bar examination. New Jersey cannot even argue that its examination is required so that all attorneys are proficient in local law. The New Jersey examination, which is basically a multistate examination, does not require knowledge of New Jersey law on the part of the examinee. Clerk of the Supreme Court of New Jersey, *Admission to the Bar* (March 1987) ("[w]hile knowledge of New Jersey law will not be critical to success on the examination, familiarity with new law or distinctive cases will aid you in preparing your responses to the questions"). A former President of the New Jersey State Bar Association has reportedly admitted

that the main argument in favor of restrictive rules is "protectionism," and has been quoted as follows: "New Jersey is [Benjamin] Franklin's keg tapped at both ends. The concern for the Newark lawyers is that New York lawyers will simply come in and treat Newark as a sixth borough, and in the southern part of the state the concern is over Philadelphia lawyers." Lauter, *Waiving Into Another Bar Isn't Always a Real Breeze*, National Law Journal, Mar. 17, 1986, at 1, 32.

In response to a recent NYSBA request that New Jersey adopt motion admissions, another former President of the New Jersey State Bar Association wrote the NYSBA that his Association's Board had voted against motion admission because: "One of our main problems is that we are sandwiched between New York City and Philadelphia. There are currently 30,742 lawyers admitted to practice in our state and the Board felt that in good conscience they could not support your proposition." Letter from J.L. White to NYSBA, dated May 22, 1986 (Appendix A hereto).

CONCLUSION

The Virginia Rule at issue employs the bar examination requirement as an artificial and unnecessary barrier to the admission of nonresident attorneys. The decision of the court below should be affirmed.

Respectfully submitted,

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February 4, 1988

APPENDIX

APPENDIX A

NEW JERSEY
STATE BAR ASSOCIATION
Headquarters 172 WEST STATE STREET, TRENTON, N.J. 08608
609-394-1101

May 22, 1986

New York State Bar Association
600 First Federal Plaza
Rochester, New York 14614

Attention: Justin L. Vigdor, Esquire

Dear Justin:

I discussed your letter of April 21, 1986 with our Board of Trustees at a regular meeting on May 15, 1986.

After a lively discussion, the Board voted against supporting motion admissions in New Jersey. I believe this is consistent with earlier positions which other Boards have taken.

One of our main problems is that we are sandwiched between New York City and Philadelphia. There are currently 30,742 lawyers admitted to practice in our state and the Board felt that in good conscience they could not support your proposition.

Best personal regards,

Sincerely,

John L. White

JLW: tk
cc: Raymond R. Trombadore, Esquire
Dalton W. Menhall, Esquire